

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 05-0336  
Cigarette Tax  
For Tax Years 2004 and 2005**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**I. Cigarette Tax--Imposition**

**Authority:** 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

**II. Tax Administration—Negligence Penalty and Interest**

**Authority:** IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

**STATEMENT OF FACTS**

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that it does not owe these taxes. Further facts will be supplied as required.

**I. Cigarette Tax--Imposition**

**DISCUSSION**

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer...." 45 IAC 15-5-3(b). Here, taxpayer protests the imposition

of cigarette tax. Taxpayer argues that he does not owe cigarette tax due to his assertion that he did not purchase the cigarettes in question.

The cigarette tax is found at IC 6-7-1-1, which states:

It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes due to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. 15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes.

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. In the course of this protest, taxpayer has provided sufficient documentation and explanation to establish that he did not sell, use, consume, handle, or distribute these cigarettes. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has met this burden.

## **FINDING**

Taxpayer's protest is sustained.

## **II. Tax Administration—Negligence Penalty and Interest**

### **DISCUSSION**

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

...

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issue I, the Department may not waive interest under IC 6-8.1-10-1.

With regard to the penalty, the Department refers to IC 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer has affirmatively established that it did not owe the deficiency, and was not negligent, as explained by 45 IAC 15-11-2(c).

**FINDING**

Taxpayer's protest is sustained.

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